

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNIE BRISCO SIMMS,

Defendant-Appellant.

UNPUBLISHED

October 1, 1999

No. 202292

Ingham Circuit Court

LC No. 96-070727 FC

Before: Fitzgerald, P.J., and Doctoroff, and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years in prison for the felony-firearm conviction and to life in prison, without the possibility of parole, for the felony murder conviction. We affirm.

Defendant first argues that his trial counsel was ineffective because he informed the jurors during closing arguments that defendant's alibi witness had lied to them. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 687.

We conclude that defendant failed to overcome the presumption that the statement was part of a sound trial strategy. At trial, defendant's alibi witness, Shonte Knox, testified that a friend, Kyla Garlitz, drove her to defendant's home on the night of the murder. However, Garlitz testified that she did not provide this transportation and that she did not even meet Knox until two years after the murder.

Furthermore, defendant testified that Knox was transported by someone other than Garlitz. Faced with this testimony, it was objectively reasonable for defendant's attorney to tell the jury that Knox had lied, especially since he knew nothing about Garlitz's denial until the prosecutor elicited it at trial. Even if there had been a better way to deal with the conflicting testimony, it is not our place to reverse a conviction merely because the defendant's attorney could have done a better job, as long as the challenged action was objectively reasonable. See *Pickens, supra* at 303.

Even if the statement had been objectively unreasonable, we would nonetheless affirm defendant's conviction because the evidence of his guilt was strong. Two witnesses, neither of whom had any apparent animosity toward defendant, testified that defendant confessed to the murder and gave a detailed account of its commission. Another witness testified that defendant brought a handgun and a garbage bag containing dirty clothes to her house on the day after the murder. She further testified that defendant reacted strangely to a television news segment about the victim's death. Given this evidence, as well as the serious credibility problems of defendant's alibi witness, we conclude that the challenged statement could not have reasonably affected the outcome of the case. Accordingly, reversal is not warranted. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant next argues that the trial court erred in admitting evidence that he used an alias when he went to California after the murder. Defendant asserts that the admission of the evidence requires reversal because the evidence was highly inflammatory and prejudicial. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Griffiths*, 218 Mich App 95, 98; 553 NW2d 642 (1996).

During his cross-examination of defendant, the prosecutor elicited testimony that defendant went to California for several months shortly after the murder. The following exchange then occurred:

Prosecutor: So, while you were in California, you used the name James Smith. Isn't that right?

Defendant: Yes, I did use – I used that name in 1992.

Prosecutor: And you used that name in 1994 too?

Defendant: No, I did not.

Prosecutor: The only time you used that name was out in California in 1992?

Defendant: Yes.

Thus, while defendant admitted that he used an alias in 1992, he denied using an alias after the 1994 murder. This Court has held that it is improper for a prosecutor to question a defendant regarding his use of an alias on some past, unspecified occasion. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Evidence regarding the use of an alias may be admissible under MRE 608 and MRE 609, however, if it is relevant to a witness' credibility. *Messenger, supra* at 180; *People v Albert Thompson*, 101 Mich App 609, 614; 300 NW2d 645 (1980). In the instant case, even if the

trial court erred in admitting testimony that defendant used an alias in 1992, he has not demonstrated that the admission of the testimony warrants reversal. Here, where the questioning regarding defendant's use of an alias was brief and the prosecutor did not refer to defendant's use of an alias during closing arguments, it does not "affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, __ Mich __; __ NW2d __ (1999); *Albert Thompson, supra* at 614. Thus, defendant is not entitled to reversal on the basis of this issue.

Finally, defendant argues that his felony murder conviction was not supported by sufficient evidence. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

The elements of felony murder are 1) the killing of a human being, 2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, and 3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Kelly*, 231 Mich App 627, 642-643; 588 NW2d 480 (1998).

Defendant challenges the sufficiency of the evidence that he had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. However, the record contained evidence that defendant shot the victim several times at close range and dumped the victim's body in a drainage ditch. Such evidence was sufficient to support the jury's finding that defendant had the intent to kill or to do great bodily harm to the victim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White